MEDICON PLASTIC INDUSTRIES SDN. BHD.

v.

SYKT. COSA SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
SHAIK DAUD ISMAIL J
[CIVIL SUIT NO. 241-1979]
25 MARCH 1992

CONTRACT: *Whether there is a contract - Consideration not passed between plaintiff and defendant - Issue - No contract document executed between the parties - Whether defendant only arranged a contract between the plaintiff and overseas principal - Defendant only an agent.*

CONTRACT: *Sale by description - plaintiff's aver that equipments delivered did not correspond to such description - Allegation that both equipments not fit for purpose - Not of merchantable quality - And defective - Whether plaintiff relying on the skill and judgment of the defendant - Claim for damages - Whether damages remote.*

The plaintiff claims that it had purchased two machineries namely the Alpla Blow Moulding Machine Model HS 40/2000 (Alpla) and a Boe Therm Temperature Controller (Boe Therm) from the defendant.

Plaintiff claims that the defendant knew at all material times that the Alpla was to be used by the plaintiff to produce plastic bottles and that the sale was a sale by description.

After both these equipments were delivered to the plaintiff, the plaintiff alleged that both the Alpla and the Boe Therm did not correspond to such description. Plaintiff further alleged that both the equipments were not fit for the purpose for which they were purchased and were also not of merchantable quality as they were defective. Particulars of the defects were given and the plaintiff alleged that the defendant had failed to rectify them. The plaintiff therefore claimed damages.

The learned Judge observed that, from the facts adduced at the trial and from the various documents admitted the first and foremost question to be decided is whether there was a contract of sale and purchase of the Alpla and Boe Therm between the defendant and the plaintiff. Also the learned Judge took into consideration that there was no contract document executed between the parties, and as such it was necessary to consider the surrounding circumstances including all relevant documents and correspondences in order to determine the issue.

Held:

[1] The learned Judge took the considered view that there was in fact and in law no contract between the plaintiff and the defendant in the purchase of these two equipments. The evidence shows that there was in law no contract between the plaintiff and the defendant.

[2] In the present case although it is not stated in so many words to the effect that the defendant was an agent of Uhag, the nature of the transaction itself and the previous knowledge of PW2 in a previous similar transaction, all correspondences and discussions prior to the issuing of the invoices and finally the invoices themselves shows that the plaintiff as the purchaser of the equipment and Uhag as the seller.

[Plaintiff's claim dismissed with costs.]

Case referred to:
Pernas Trading Sdn. Bhd. v. Persatuan Peladang Bakti Melaka [1979] 2 MLJ 124 ***(dist)***

For the plaintiff - A. Kanesalingam; M/s. Kanesalingam & Co.
For the defendant - Chin Yew Meng (Azhar Azizan Harun with him); M/s. Allen & Gledhill

JUDGMENT

Shaik Daud Ismail J:

The plaintiff claims that it had purchased two machineries namely the Alpla Blow Moulding Machine Model HS 40/2000 (hereinafter referred to as the "Alpla") and a Boe Therm Temperature Controller (hereinafter referred to as the "Boe Therm") from the defendant. Plaintiff claims that the defendant knew at all material times that the Alpla was to be used by the plaintiff to produce plastic bottles and that the sale was a sale by description.

After both these equipments were delivered to the plaintiff, the plaintiff alleged that both the Alpla and the Boe Therm did not correspond to such description. Plaintiff further alleged that both the equipments were not fit for the purpose for which they were purchased and were also not of merchantable quality as they were defective. Particulars of the defects were given and the plaintiff alleged that the defendant had failed to rectify them. The plaintiff therefore claims damages.

The defendant on the other hand contends that there was no contract between the plaintiff and them and denies that the plaintiff had purchased the Alpla and the Boe Therm from the defendant. The defendant alleged that the contract for the sale was between the plaintiff and the defendant's principal one Uhag Ubersee Handel AG of Switzerland (hereinafter referred to as "Uhag").

The defendant further contends that even if there was a contract between the plaintiff and the defendant, which they denied, the contract was in fact for the sale of a specified article under its patent or trade name and therefore there was no implied condition as to fitness for any particular purpose as the plaintiff was not relying on the skill and judgment of the defendant. The defendant also denies that the equipment did not correspond with the description and that the equipment was defective as alleged. It is also the defendant's contention that the plaintiff had not in fact rejected the equipments within the guarantee period of six months. As for the damages claimed the defendant denies the same and contends that damages are not recoverable as they are too remote.

From the facts adduced at the trial and from the various documents admitted the first and foremost question to be decided is whether there was a contract of sale and purchase of the Alpla and Boe Therm between the defendant and the plaintiff. At the outset it must be stated that there was no contract document executed between the parties. As such I would have to consider the surrounding circumstances including all relevant documents and correspondences in order to determine this issue. I am of the considered view that there was in fact and in law no contract between the plaintiff and the defendant in the purchase of these two equipments. This to me is apparent from the uncontroverted testimony of DW3 Tan Ho Boo the Gen. Manager of the defendant. He testified that:

> Defendant never purchased the 2 machines and resold them to the plaintiff. **We acted as commission-agent.** We act for Uhag for the customers and once the technical and commercial terms are agreed financial settlement is between the customer and the principal that is Uhag and shipment made directly from the principal to the customer. For this transaction Cosa received a commission.
> (Emphasis is mine)

In cross examination DW3 re-iterated the above testimony and added that there were two ways of the sale. One way is where defendant would purchase the machinery from an overseas supplier and keep it as their stock and then resell the machinery to a local buyer. In the present transaction the former method was adopted that is as a commission agent. This testimony of DW3 was not challenged either by oral or documentary evidence except the evidence of PW2 Mr. Anthony Segamoney, Managing Dir. of plaintiff that he was never told that defendant was acting as an agent; and that he was made to understand (did not say how or by whom) that defendant was a branch office of Uhag. During cross-examination, however, it was brought to his attention notes of evidence of a previous hearing and having seen them he now confirms that he did testify then that Cosa was acting as an agent of Uhag and he conceded this and went on further to say that he knew the identity of the defendant's principal. He further added that he was aware defendant was local agent of the foreign company and were in fact negotiating as an agent.

This evidence of PW2 clearly shows that there was in law no contract between the plaintiff and the defendant. Furthermore, as was conceded by PW2 prior to this particular transaction, he as a partner of another company called Jaaf Trading Co. had previously purchased an Alpla through the defendant. The purchase order dated 15 March 1976 (see p. 4 of CD) in relation to that previous purchase shows clearly that the supplier was none other than Uhag. As such in negotiating for the purchase of the present Alpla on behalf of plaintiff PW2 must know that Uhag was the seller and not the defendant. The earliest knowledge PW2 had of the agency can be found in a letter handwritten by him to defendant dated 4 October 1976 (see p. 10 of CD). The oral testimony of DW3 and for that matter of PW2 as well on the knowledge of the agency is corroborated by these two documents.

The terms of payment for the equipment is specified in a letter from defendant to the plaintiff dated 8 July 1977. This shows clearly that payments were to be made directly to Uhag. If the defendant was the seller of the equipment the question is why should payments be made directly to Uhag. Further evidence of the agency can be found in a letter dated 28 July 1977 from the defendant to the plaintiff which states "we received a telex the next day from our principal ..." (see p. 24 of CD) and another letter from PW2 himself who wrote directly to Uhag dated 17 October 1977 (see p. 31 of CD). It is apparent from this letter that PW2 was in fact negotiating directly with Uhag. I agree with the submissions of learned Counsel of the defendant that PW2's action in writing and negotiating directly with Uhag shows the true intention to bind Uhag in the transaction and not the defendant. Invoices sent from Uhag to plaintiff directly for the Alpla and Boe Therm respectively shows that the parties are plaintiff and Uhag and these two invoices made no mention whatsoever of the defendant.

In *Pernas Trading Sdn. Bhd.* v. *Persatuan Peladang Bakti Melaka* [1979] 2 MLJ 124 the appellants sued the respondents for balance of the price of goods sold and delivered to the respondents. In their defence the respondents denied liability and sought to show that the goods were ordered for a third party namely Syahazam Sdn. Bhd. The Federal Court held that the respondent's contention that the goods were not ordered on their behalf must fail in view of the sales invoice and the delivery note. The Court further added that the sale invoice and delivery note being the contract reduced in writing between the appellants and the respondent, s. 92 therefore applies. The Court finally held that irrespective of whether the respondents were ordering the goods on behalf of Syahazam Sdn. Bhd. the sales invoice and delivery note plainly show that the respondents were the purchaser and the receiver of the goods and no one else.

In the present case although it is not stated in so many words to the effect that the defendant was an agent of Uhag, the nature of the transaction itself, the previous knowledge of PW2 in a previous similar transaction, all correspondences and discussions prior to the issuing of the invoices and finally the invoices themselves shows that the plaintiff as the purchaser of the equipments and Uhag the seller. This to my mind is not a case where the defendant had entered into a contract with the plaintiff on behalf of their overseas principal but rather of a case where the defendant merely arranged a contract which was entered into between the plaintiff and Uhag. Defendant therefore was only an agent and there was no contract between defendant and plaintiff.

Another factor which is glaringly clear is the question of consideration. If as the plaintiff contends that there was a contract between the plaintiff and the defendant the plaintiff would have to show that consideration for the contract flowed from the plaintiff to the defendant. The plaintiff has failed to show that consideration passed from them to defendant. On the contrary the evidence shows that plaintiff paid directly to Uhag for the Alpla and Boe Therm by way of letter of credit (see p. 21 of CD). The defendant had merely received the deposit on behalf of Uhag.

In the light of all these documents and testimonies I agree with the submission of Counsel for the defendants and I hold that there was no contract between the plaintiff and the defendant. Having arrived at this finding I feel that there is therefore no need for me to consider other matters raised. The plaintiff's claim is hereby dismissed with costs.

Also found at [1992] 2 CLJ 1044